AU KEAN HOE v. PERSATUAN PENDUDUK D'VILLA EQUESTRIAN

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(f)-50-08-2013(B)]
19 MARCH 2015

TORT: *Nuisance – Obstruction on road – Erection of guard house and boom gates in residential area – Whether illegal structures – Whether approval of local authority obtained – Failure to pay maintenance and security charges – Whether appellant compelled to open gate for himself and his visitors – Whether amounted to obstruction on public road pursuant to s. 46(1)(a) Street, Drainage and Building Act 1974 – Whether inconvenience caused to appellant amounted to nuisance – Whether being inconvenienced and obstructed were two different circumstances – Whether claim actionable*

LOCAL GOVERNMENT: *Buildings – Erection – Boom gates and guard house built in residential area – Whether approval of local authority obtained – Whether illegal structures – Whether amounted to obstruction on public road – Street, Drainage and Building Act 1974, s. 46(1)(a)*

The appellant and his wife were purchasers and co-owners of a house ('the housing estate') while the respondent was the Residents' Association of the housing estate. There was only one entrance and exit road to the housing estate and the developer of the housing estate had constructed two boom gates and a guard house on the said road. During a meeting held on 21 July 2007, the residents of the housing estate had agreed that those who did not pay for the security and maintenance charges would not enjoy the facilities provided by the guards at the gate or other security facilities. Subsequently, the respondent proceeded to issue a circular which stated that those who did not pay the security and maintenance charges would have to open the boom gates themselves without the assistance of the security guard on duty. Since August 2010, the appellant stopped paying for the maintenance and security charges and being dissatisfied with the circular issued by the respondent, the appellant lodged a complaint to Majlis Bandaraya Petaling Jaya ('MBPJ'). The appellant then commenced an action against the respondent on the grounds of, *inter alia*, nuisance and that the alleged obstructions were illegal structures. It was argued that the respondent's operation of the boom gates in compelling the appellant to open the gate for himself and his visitors was clearly an obstruction pursuant to s. 46(1)(a) of the Street, Drainage and Building Act 1974 ('SDBA') and the boom gates were illegal as they constitute an obstruction over a public road. It was also contended that the obstructions were built without the prior approval of MBPJ and in any event,

the respondent did not operate the alleged obstructions in the manner allowed or approved by MBPJ which resulted in a breach of the MBPJ guidelines. The respondent, on the other hand, counterclaimed for arrears of security and maintenance charges and also for an injunction to restrain the appellant from harassing the respondent and the security guards at the guard house. Dismissing the appellant's claim and allowing the respondent's counterclaim in part, the High Court decided that being inconvenienced and being obstructed were two different circumstances and scenarios. The High Court found that the appellant had been inconvenienced by getting down from his car and to operate the button at the guard house to lift the boom gate himself but the appellant had not at any time been obstructed, prevented or hindered from entering his residence. On appeal, the Court of Appeal affirmed the decision of the High Court. Dissatisfied, the appellant appealed to this court and submitted that both the High Court and the Court of Appeal failed to consider the application and implication of s. 46(1)(a) of the SDBA. The questions of law which arose for determination were (i) whether the erecting of a guard house and a boom gate across a public road in a residential area amounted to an obstruction within the meaning of s. 46(1)(a) of the SDBA; and (ii) whether a local government was empowered to authorise or otherwise approve an obstruction within the meaning of s. 46(1)(a) of the SDBA.

Held (dismissing appeal with costs)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Section 46(1)(a) of the SDBA had no application where the local authority had given approval for the so-called obstruction complained of. The layout plan for development is a requirement under the Town and Country Planning Act 1976 ('TPCA'). On the facts, the developer, as the predecessor to the respondent, had obtained the approval from MBPJ in 2002 for the construction of the guard house where the layout plan submitted to MBPJ included the provision for the building of a guard house. Further, in 2012, there was a second approval from MBPJ, after the gated and guarded community concept became popular. The approval was specific with regard to a guard house and accompanying boom gates (*UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Sdn Bhd & Other Appeals*; refd). (paras 15, 16, 17, 18 & 20)

(2) Pursuant to s. 70(3) of the SDBA, the local authority is the approving authority for the erection of any building. The term 'building' is defined under the SDBA to include 'any house, hut, shed … gate'. MBPJ, thus, was the rightful authority for the approval of the guard house and the boom gates as 'buildings' under the SDBA. Further, the Local Government Act 1976 ('LGA') contains provision empowering the local authority to do all that is necessary for or conducive to the public safety, health and convenience. On the facts, the guard house and the

boom gates were duly authorised structures under the relevant statutes, *ie*, the TCPA, the SDBA and the LGA and could not therefore in law be an obstruction under s. 46(1)(a) of the SDBA. The first question posed in this appeal was answered in the negative. (paras 19, 20, 21 & 28)

(3) The guarded communities were schemes implemented to improve public safety and security in defined residential areas. A regulated access to a defined area was not an obstruction in law especially if it was for security purposes. On the facts, the MBPJ guidelines in relation to a guarded community dealt with the rights of those residents who opted not to participate in the security scheme. The appellant did not complain that he or his family was prohibited from access at all or that the boom gates were a barricade against him or his family. The appellant's complaint was a complaint of inconvenience and not of obstruction. (paras 20, 23, 24 & 28)

(4) At common law, both actionable obstruction or actionable private nuisance was not available for inconvenience. The conduct has to be unreasonable in the circumstances of the case for it to be actionable. Individuals live within a community and it is always the balancing of the individuals' inconvenience against the communities' interest that is of paramount concern. Both the High Court and the Court of Appeal had correctly concluded that the appellant's inconvenience was not an actionable nuisance by the presence of the guard house and the boom gates. In the circumstances, there was no necessity to answer the second question as it was too general and not based on specific factual circumstances (*George Philip & Ors v. Subbammal & Ors*; refd). (paras 25-28)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan isterinya merupakan pembeli dan pemilik bersama sebuah rumah ('kawasan perumahan') manakala responden adalah Persatuan Penduduk kawasan perumahan tersebut. Hanya terdapat satu jalan masuk dan keluar ke kawasan perumahan tersebut dan pemaju perumahan tersebut telah mendirikan dua pagar berpalang dan sebuah pondok pengawal keselamatan di atas jalan tersebut. Semasa satu mesyuarat yang diadakan pada 21 Julai 2007, penduduk-penduduk kawasan perumahan tersebut telah bersetuju bahawa mereka yang tidak membayar yuran kawalan keselamatan dan penyelenggaraan tidak boleh menikmati kemudahan yang disediakan oleh pengawal di kawasan pagar atau kemudahan kawalan keselamatan yang lain. Kemudian responden telah mengeluarkan pekeliling bahawa mereka yang tidak membayar yuran kawalan keselamatan dan penyelenggaraan perlu membuka pagar berpalang sendiri tanpa bantuan pengawal keselamatan bertugas. Sejak Ogos 2010, perayu telah berhenti membayar yuran tersebut dan tidak berpuas hati dengan pekeliling yang dikeluarkan oleh responden, perayu telah membuat aduan kepada Majlis Bandaraya Petaling Jaya

('MBPJ'). Perayu kemudiannya memulakan tindakan terhadap responden atas alasan, antara lain, kacau ganggu dan bahawa penghalang merupakan struktur yang tidak sah di sisi undang-undang. Dihujahkan bahawa memaksa perayu membuka sendiri pagar tersebut dan untuk pelawat-pelawatnya merupakan suatu penghalang di bawah s. 46(1)(a) Akta Jalan, Parit dan Bangunan 1974 ('SDBA') dan pagar berpalang tersebut adalah tidak sah kerana ia merupakan penghalang atas jalan awam. Dihujahkan lagi bahawa penghalang-penghalang tersebut dibina tanpa kebenaran awal MBPJ dan dalam apa jua keadaan, responden tidak mengendalikan penghalang tersebut seperti yang dibenarkan oleh MBPJ, menyebabkan garis panduan MBPJ diingkari. Responden, sebaliknya, membuat tuntutan balas bagi tunggakan yuran kawalan keselamatan dan penyelenggaraan dan telah memohon satu injunksi menghalang perayu daripada mengganggu responden dan pengawal keselamatan di pondok pengawal keselamatan. Menolak tuntutan perayu dan membenarkan sebahagian tuntutan balas responden, Mahkamah Tinggi memutuskan bahawa ketidakselesaan dan halangan merupakan dua keadaan yang berbeza. Mahkamah mendapati bahawa perayu telah mengalami ketidakselesaan apabila dia terpaksa keluar dari keretanya untuk mengendalikan butang di pondok pengawal bagi menaikkan pagar berpalang tetapi perayu tidak pada bila-bila masa dihalang atau dihindari daripada memasuki rumahnya. Atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Tidak berpuas hati, perayu merayu ke mahkamah ini dan menghujahkan bahawa kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan gagal untuk mempertimbangkan pemakaian dan implikasi s. 46(1)(a) SDBA. Persoalan undang-undang yang dibangkitkan untuk pertimbangan adalah (i) sama ada pembinaan pondok pengawal dan pagar berpalang di atas jalan awam di kawasan perumahan merupakan satu penghalang dalam erti kata s. 46(1)(a) SDBA; dan (ii) sama ada kerajaan tempatan mempunyai kuasa untuk memberi kebenaran atau meluluskan suatu penghalang dalam erti kata s. 46(1)(a) SDBA.

Diputuskan (menolak rayuan dengan kos)

Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Seksyen 46(1)(a) SDBA tidak terpakai apabila pihak berkuasa tempatan memberi kebenaran kononnya untuk penghalang yang diadukan. Pelan susunatur untuk pembangunan adalah suatu kehendak di bawah Akta Perancangan Bandar dan Desa 1976 ('TPCA'). Berdasarkan fakta, pemaju, sebagai pendulu kepada responden, telah pun memperolehi kebenaran daripada MBPJ pada tahun 2002 untuk pembinaan pondok pengawal di mana pelan susunatur telah diserahkan kepada MBPJ yang merangkumi peruntukan untuk pembinaan pondok pengawal. Tambahan lagi, pada tahun 2012, terdapat kebenaran kedua daripada MBPJ, iaitu selepas konsep komuniti berpagar dan terkawal menjadi terkenal. Kebenaran tersebut khas buat pondok pengawal bersama-sama dengan pagar berpalang (*UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Sdn Bhd & Other Appeals*; dirujuk).

(2) Berikutan s. 70(3) SDBA, pihak berkuasa tempatan merupakan pihak yang mempunyai kuasa untuk memberi kebenaran bagi pembinaan mana-mana bangunan. Terma 'bangunan' ditafsirkan di bawah SDBA yang merangkumi 'apa-apa rumah, pondok, bangsal … pagar'. MBPJ, oleh itu, merupakan pihak yang mempunyai kuasa untuk memberi kebenaran bagi pondok pengawal dan pagar berpalang sebagai 'bangunan' di bawah SDBA. Tambahan lagi, Akta Kerajaan Tempatan 1976 ('LGA') mengandungi peruntukan yang memberi kuasa kepada pihak berkuasa tempatan untuk membuat segala yang diperlukan atau kondusif kepada keselamatan orang awam, kesihatan dan keselesaan. Berdasarkan fakta, pondok pengawal dan pagar berpalang merupakan struktur-struktur yang telah disahkan di bawah statut-statut relevan, iaitu, TCPA, SDBA dan LGA dan oleh itu, tidak boleh menjadi penghalang di bawah s. 46(1)(a) SDBA. Persoalan pertama yang dikemukakan dalam rayuan ini dijawab secara negatif.

(3) Komuniti berpagar merupakan skima yang dilaksanakan untuk memperbaiki keselamatan awam dan kawalan keselamatan di kawasan perumahan yang ditentukan. Akses berperaturan ke suatu kawasan tertentu bukan penghalang di bawah undang-undang terutamanya jika ia bagi tujuan keselamatan. Berdasarkan fakta, garis panduan MBPJ berkenaan komuniti berpagar tertumpu kepada hak penduduk-penduduk yang memilih untuk tidak melibatkan diri dalam skima kawalan keselamatan tersebut. Perayu tidak mengadu bahawa dia atau keluarganya dilarang daripada mengakses ataupun pagar berpalang menjadi penghalang untuknya atau keluarganya. Aduan perayu merupakan suatu aduan ketidakselesaan dan bukannya penghalangan.

(4) Di bawah common law, kedua-dua tindakan bagi penghalang atau tindakan bagi kacau ganggu tidak boleh diperolehi untuk ketidakselesaan. Kelakuan tersebut mestilah tidak munasabah supaya suatu tindakan boleh diambil. Individu-individu tinggal di dalam suatu komuniti dan selalunya pertimbangan ketidakselesaan individu terhadap kepentingan komuniti merupakan persoalan utama. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah memutuskan dengan betul bahawa ketidakselesaan perayu bukanlah suatu kacau ganggu di mana tindakan boleh diambil dengan kehadiran pondok pengawal dan pagar berpalang. Tiada keperluan untuk menjawab persoalan kedua memandangkan ia terlalu am dan tidak berdasarkan keadaan fakta spesifik (*George Philip & Ors v. Subbammal & Ors*; dirujuk).

Case(s) referred to:

George Philip & Ors v. Subbammal & Ors AIR 1957 Tra-Co 281 ***(refd)***

Harper v. Gn Haden Sons Ltd [1983] Ch 298 ***(refd)***

Teoh Soon Kok T/A TSK Suppliers v. Yang Dipertua Majlis Daerah Kuala Muda [1998] 5 CLJ 790 HC ***(refd)***

Trevett & Anor v. Lee & Anor [1955] 1 WLR 113 ***(refd)***

UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

Legislation referred to:
Local Government Act 1976, s. 101(v)
Road Transport Act 1987, ss. 70, 71
Street, Drainage and Building Act 1974, ss. 3, 46(1)(a), (3), 70(3)
Town and Country Planning Act 1976, ss. 2, 5, 18, 19, 21A(1)(f), 21B(c)

For the appellants - Malik Imtiaz Sarwar (Eric Tan, Chan Wei June & Sohan Yong with him); M/s Ong Kok Bin & Co
For the respondent - Cyrus Das (Atma Singh Veriah & DR John with him); M/s Atma Singh Veriah & Co

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court at Shah Alam. The High Court had dismissed the appellant's claim against the respondent for nuisance and obstruction as well as for injunction and allowing the respondent's counterclaim for damages to the boom gates and for the order restraining the appellant from harassing the committee members of the respondent and the security guards.

[2] Dissatisfied with the decision of the Court of Appeal, the appellant sought and obtained leave from this court to appeal against the said decision on the following two questions of law:

(i) Whether the erecting of a guard house and a boom gate across a public road in a residential area amounts to an obstruction within the meaning of s. 46(1)(a) of the Street, Drainage and Building Act 1974 ("SDBA"); and

(ii) Whether a local government is empowered to authorise or otherwise approve an obstruction within the meaning of s. 46(1)(a) of the SDBA.

Background Facts

[3] The relevant backgrounds of the case may be summarised as follows:

(i) The appellant and his wife are the purchasers and co-owners of a house No. 7, Jalan Kenyalang 11/5E, D'Villa Equestrian, Kota Damansara, 47810 Petaling Jaya ("the housing estate"). They purchased the house from the first buyer on 23 November 2006 and moved in on January 2007.

(ii) The housing estate was developed by Sunway Damansara Sdn. Bhd. ("the developer"). There is only one entrance and exit road to the housing estate, that is Jalan 11/15. The developer had constructed two boom gates and a guard house on Jalan 11/15 of the housing

estate. The developer was responsible for the security and maintenance including the two boom gates and the guard house of the housing estate until December 2007.

(iii) When the appellant and his wife purchased the house in the housing estate, the two boom gates and the guard house were already in place and functioning.

(iv) The respondent is the Residents' Association ("RA") of the housing estate. It is registered under the Societies Act 1966. The appellant was a member of the RA and was the Treasurer from May 2009 to March 2010. He took no objection to the boom gates during this period.

(v) Beginning from January 2008, the residents of the housing estate were required to pay RM250 per month to the respondent as security and maintenance charges. This amount was later reduced to RM200 per month sometime in August 2009. At a meeting held on 21 July 2007, the residents of the housing estate had unanimously agreed that those who do not pay for the security and maintenance charges will not enjoy the facilities provided by the guards at the gate or the security facilities.

(vi) The appellant ceased to be a member of the RA sometime in August 2010 and had since then stopped paying the maintenance and security charges.

(vii) On 25 October 2011 the respondent issued a circular signed by the Chairman, the Treasurer and the Secretary of the RA notifying the residents that those who have not paid the security and maintenance charges will have to do a self-service entrance to the housing estate; that is to say that they will have to open the boom gates themselves without the assistance of the security guard on duty.

(viii) Dissatisfied with the above circular the appellant lodged a police report dated 30 October 2011. The appellant also lodged an online complaint dated 31 October 2011 through the local authority, Majlis Bandaraya Petaling Jaya ("MBPJ") website.

(ix) The appellant discovered that the respondent's application to MBPJ for setting up of the alleged obstructions (the boom gates and the guard house) was made retrospectively. MBPJ had approved the alleged obstruction in a meeting on or about 22 December 2011 and this was confirmed by way of a letter dated 11 January 2012.

(x) Of the 114 residents, 113 have agreed to the guarded community scheme by the RA. Only the appellant has objected but only insofar that he should not be inconvenienced by the scheme.

(xi) The appellant commenced the action against the respondent on the grounds of *inter alia* nuisance and that the alleged obstructions were illegal structures that amounted to obstructions in law. Additionally the appellant sought an order that the alleged obstructions be demolished. The respondent counterclaimed for arrears of security and maintenance charges and also for an injunction restraining the appellant from harassing the respondent and the security guards at the guard house.

Findings Of The High Court

[4] The learned High Court Judge dismissed the appellant's claim and allowed the respondent's counterclaim in part, by issuing an injunction restraining the appellant from harassing the respondent and the security guards. The learned High Court Judge *inter alia* held that:

> I find that there is nothing unreasonable to direct the guards not to assist the residents who have not paid the security charges especially when all residents (except the plaintiff) had agreed to adhere to the notice of self-service entrance and had paid for the fees upon receipt of the notice.
>
> Neither is there a real interference with the comfort or convenience of living according to the standards of the average man by having the guard house and the boom gates at D'Villa Equestrian. By having to get down from his car and operate the button at the guard house to lift the boom gate himself, the plaintiff had certainly been inconvenienced but as the plaintiff admitted, he has not at any time been obstructed ie, being prevented or hindered from entering his residence. Being inconvenienced and being obstructed are entirely two different circumstances and scenarios.

Findings Of The Court Of Appeal

[5] The Court of Appeal on appeal by the appellant against the decision of the High Court affirmed the decision of the High Court and *inter alia* held as follows:

> The plaintiff also contended that the boom gates and the guard house is a nuisance because it is an obstruction in a public place and therefore are in contravention of section 46(1)(a) of the Street, Drainage and Building Act 1974. That section makes it an offence for any person who erects or maintains obstruction in any public place. However on the facts and in the circumstances of this case, we are unable to agree with the contention by the plaintiff. The learned judge in her judgment had found that though the plaintiff had certainly been inconvenienced by the presence of the guard house and the boom gates, the plaintiff has not at any time been obstructed i.e. being prevented or hindered from entering or leaving his residence. The learned Judge went further to say that being inconvenienced and being obstructed are entirely two different circumstances and scenarios. We agree with this view by the learned Judge.

Furthermore, the obstruction complained by the plaintiff in this case is not of the same class or category as the obstruction caused by the closure of the public road leading to the main entrance of the supermarket in *UDA Holdings Berhad*'s case.

Submission Of The Appellant

[6] On the First Question raised for the determination of this court learned counsel for the appellant submitted that both the High Court and the Court of Appeal failed to consider the application and implication of s. 46(1)(a) of the SDBA. This is despite the fact that the alleged obstructions are situated on a public road and were built without the prior approval of MBPJ. In any event, the appellant contended that the respondent did not operate the alleged obstructions in the manner allowed or approved by MBPJ. Section 46(1)(a) of the SDBA provides as follows:

46. Obstruction

(1) Any person who:

(a) builds, erects, sets up or maintains or permits to be built, erected or set up or maintained any wall, fence, rail, post or any accumulation of any substance, or other obstruction, in any public place;

shall be guilty of causing an obstruction and may be arrested without warrant by any officer or employee of the local authority authorized in writing in that behalf by the local authority and taken before a Magistrate's Court and shall be liable on conviction to a fine not exceeding five hundred ringgit, and in the case of a second or subsequent conviction to a fine not exceeding one thousand ringgit.

[7] As regards application of s. 46(1)(a) of the SDBA and obstruction situated on a public road, learned counsel for the appellant referred to us a number of case authorities and amongst them is the High Court decision of *Teoh Soon Kok T/A TSK Suppliers v. Yang Dipertua Majlis Daerah Kuala Muda* [1998] 5 CLJ 790 wherein Hishamudin Mohd Yunus, J (as he then was) held as follows:

The learned counsel for the appellant had argued that there was no obstruction to road users since the road in question was not a through road but lead to a dead end. The evidence of both sides in the present case was not clear as to on which part of the road were the goods deposited. It was merely said in evidence that the items were found deposited on the road. However, even assuming that they were deposited at the dead end part of the road, still, to my mind, that tantamount to obstructing the usage of the road. Members of the public are entitled to the maximum utilization of the road.

[8] It was submitted for the appellant that the word "boom gate" should rightfully fall within the term "post" as provided for under s. 46(1)(a) of the SDBA. The boom gate is in nature an obstruction placed on the public road

by the respondent to impede the appellant's use of the said road. With regard to the facts of the case it was the contention of the appellant that in answer to the First Question in the instant case, a guard house and a boom gate across a public road in a residential area amounted to an obstruction for the following reasons:

(i) The appellant, his family and guests, together with all non paying residents must get down from their vehicle and open the boom gate by themselves.

(ii) The respondent in imposing the operation of the boom gate against the appellant was in breach of the MBPJ Guidelines and the MBPJ Letter of Approval dated 22 December 2011 which are namely as follows:

(a) The residents who are not participants of the scheme should not be obstructed at all from entering their residence at any time; and

(b) There is a security guard controlling the boom gate 24 four hours a day. The boom gate is only operational from 12am to 6pm when in reality was being operated 24 hours a day.

[9] It was also the appellant's submission that the existence of the boom gate remained as an issue to be decided as the boom gate had not been included in the MBPJ approved plans of the guard house. Hence it was the appellant's contention that the respondent's operation of the boom gate in compelling the appellant to open the boom gate for himself and his visitors was clearly an obstruction pursuant to s. 46(1)(a) of the SDBA. Therefore it was submitted that the First Question is to be answered in the affirmative.

[10] On the Second Question posed in this appeal learned counsel for the appellant submitted that s. 46 of the SDBA on the face of it does not provide for the authorisation and/or approval of an obstruction. Section 46 deals with existence of an obstruction in any public place and the repercussions faced should one be guilty of causing an obstruction. It is apparent from the reading of s. 46(1)(a) of the SDBA that the power conferred to a local authority is only to remove obstructions.

[11] Similarly it was contended for the appellant that s. 46(1)(a) of the SDBA only empowers the local authority to arrest any person who builds, erects or maintains an obstruction. It is evident that the local authority has no duty to authorise or otherwise approve an obstruction within the definition of the said section.

[12] Further, it was also submitted that the respondent's action of setting up the alleged obstruction in accordance with its own regulations is ultimately an attempt at regulating motor vehicles and traffic on public roads which it has no power or authority to do so. Such regulation is only permitted under the Road Transport Act 1987. (See ss. 70 and 71).

Submission Of The Respondent

[13] Learned counsel for the respondent submitted in reply at the outset that the illegality issue was not the subject of the complaint of the appellant but was being deployed by him as a threat to obtain the assurance that the operation of the boom gate should not inconvenience him although he was not a paying resident. Accordingly, the Court of Appeal noted in its judgment that with regard to the illegality of the boom gates it is a non issue in the appeal. The Court of Appeal further noted that only the issue of nuisance by the use of the boom gates remained to be decided. In the circumstances it was contended for the respondent that the illegality issue is not a live issue before this court. The illegality issue has become academic as it has ceased to be the real complaint to the appellant. This court was therefore invited by the respondent to decline to answer the question on illegality.

Decision

[14] Notwithstanding the contention of the respondent that the Court of Appeal had made a finding that with regard to the illegality of the boom gate, it is a non issue in the appeal, we take the view that the two questions posed in this appeal which relate to the illegality issue of the boom gate shall nevertheless be dealt with.

[15] The appellant relies on s. 46(1)(a) of the SDBA to contend that the boom gates are illegal as they constitute an obstruction over a public road. With respect, we do not agree with such a contention. On the scope of application of s. 46(1)(a) of the SDBA, it has been held by the Federal Court in *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329 that s. 46(1)(a) of the SDBA has no application where the local authority has given approval for the so-called obstruction complained of. Section 46(1)(a) of the SDBA must be read with s. 46(3) of the SDBA that empowers the local authority to remove an obstruction. Abdul Aziz Mohamad, FCJ on this point held *inter alia* as follows:

> The erection of the building was with the approval of DBKL. As far as concerns section 46, the case is no different from that of a person who obtained a TOL in respect of some other State land in Kuala Lumpur and built on it a temporary shop with the approval of DBKL. It is ludicrous to suggest that he thereby built or erected an obstruction in a public place and committed an offence under para (a) of subsection (1) of section 46 and that DBKL, who approved the construction of the building, had a duty under subsection (3)(a) to remove it. The situation is simply not of the kind intended by section 46.

[16] We are of the view the principal issue to be decided in this case is whether the guard house and the boom gates were constructed with the approval of the relevant local authority, namely, the MBPJ. In this regard it is noted in 2002 there was the approval of the lay out plan submitted by the developer to the MBPJ that included provision for the building of a guard house.

[17] The lay out plan for development is a requirement under the Town and Country Planning Act 1976 ("the TCPA"). Under s. 5 of TCPA the local authority is the relevant planning authority for any local area. Under ss. 18 and 19 of the TCPA no development may take place in a local area without planning approval. By s. 21A(1)(f) of the TCPA a development proposal must contain a lay out plan. By s. 21B(c) of the TCPA the lay out plan must contain particulars of any building to be built. The definition of "building" in s. 2 of the TCPA is wide and includes "any house, shed or hut". We are of the view the developer as the predecessor to the respondent had thus obtained approval from the MBPJ for the construction of the guard house by the approval of the layout plan.

[18] It is also to be noted that the construction of a guard house is invariably accompanied with the construction of a gate. In any event in the year 2012 there was a second approval from the MBPJ, after the gated and guarded community concept became popular. The approval was specific with regard to a guard house and accompanying boom gates. Initially the MBPJ's approval was for the boom gates to be down only from midnight to 6am. However, by a letter dated 30 January 2012 from the officer in charge of the Police District (OCPD) for Kota Damansara had directed the respondent to keep the boom gate functional throughout the day to improve the security in the area.

[19] We are of the view there could be no dispute over the authority of the MBPJ to issue the guidelines for Guarded Communities and give approval in accordance therewith. The MBPJ Guidelines were issued in May 2011 by the Jabatan Perancang Bandar. Under the SDBA the local authority has full supervisory authority over all "buildings" both at the pre-construction and post-construction stage. Like under the TCPA, the term "building" is defined widely under the SDBA to include "any house, hut, shed ... gate" (see s. 3). By s. 70(3) of the SDBA the local authority is the approving authority for the erection of any building. It follows that the MBPJ is the rightful authority for the approval of the guard house and the boom gates as "buildings" under the SDBA.

[20] In the context of the present case useful reference can be made to another statute, the Local Government Act 1976 ("LGA") which contained provision empowering the local authority to do all things necessary for or conducive to the public safety, health and convenience. (See s. 101(v)). In this regard it cannot be disputed that guarded communities are schemes implemented to improve public safety and security in defined residential areas.

[21] It is our judgment that the guard house and boom gates are duly authorised structures under the relevant statues namely the TCPA, the SDBA and the LGA and cannot therefore in law be an obstruction under s. 46(1)(a) of the SDBA as posed by the First Question in this appeal.

[22] On the approval issue posed in the Second Question in this appeal as to whether a local authority is empowered to approve an obstruction under s. 46(1)(a) of the SDBA, the answer to this argument in our view must be made by way of reference to the statutory provisions referred to in the preceding paragraphs. It is our finding that these provisions make it clear that the MBPJ, as the relevant local authority is fully empowered to approve the construction of "buildings" which may be in the nature of a guard house with boom gates.

[23] We shall now deal with the issue of nuisance. It is noted that the two questions posed in this appeal are premised on the assumption that operating a security gate system in a residential area is an actionable obstruction in law. In our view this is clearly wrong. A regulated access to a defined area is not an obstruction in law especially if it is for security purposes. It is so only if one is denied access to a public place. It is not a barricade that is placed across a public road that denies access altogether to all who wish to enter. The MBPJ Guidelines, on which the January 2012 approval was given, addresses this issue. The guidelines in relation to a guarded community deal with the rights of those residents who opt not to participate in the security scheme. It says in para. 2(f) of the guidelines as follows:

> Penghuni yang tidak menyertai skim ini tidak boleh dihalang sama sekali memasuki kediaman mereka pada bila-bila masa.

[24] It is noted in the present case that the appellant does not complain that he or his family are prohibited from access at all or that the boom gates are a barricade against him or his family. His complaint is that he is inconvenienced because he has to engage in self-service to lift the gate. In short, the appellant's complaint in reality is a complaint of inconvenience and not of obstruction.

[25] At common law, both actionable obstruction or actionable private nuisance is not available for inconvenience. The decided cases have shown that it is a matter of degree at all times and the conduct has to be unreasonable conduct in the circumstances of the case for it to be actionable. In *Trevett & Anor v. Lee & Anor* [1955] 1 WLR 113 Lord Evershed observed that the question whether a householder is or is not obstructing the highway so as to give rise to cause of action is to be judged by balancing on standards of reasonableness, the claims and conduct of the householder on the one side and the members of the public on the other. Lord Evershed adopted the rule propounded by Romer J in *Harper v. Gn Haden Sons Ltd* [1983] Ch 298 as follows:

> The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.

[26] We are of the view the underlying rule is a recognition that individuals live within a community and it is always the balancing of the individuals' inconvenience against the communities' interest that is of paramount concern. On this point in *George Philip & Ors v. Subbammal & Ors* AIR 1957 Tra Co 281, the High Court in India observed as follows:

> Every little discomfort or inconvenience cannot be brought on to the category of actionable nuisance. Consistent with the circumstances under which a person is living, he may have to put up with a certain amount of inevitable annoyance or inconvenience. But if such inconvenience or annoyance exceeds all reasonable limits, then the same would amount to actionable nuisance. The question as to what would be a reasonable limit in a given case will have to be determined on a consideration as to whether there has been a material interference with the ordinary comfort and convenience of life under normal circumstances.

[27] It is our judgment that both the High Court and the Court of Appeal had correctly concluded that the appellant's inconvenience was not an actionable nuisance by the presence of the guard house and the boom gates.

Conclusion

[28] For the reasons abovestated on the facts and circumstances of the present case, the First Question posed in this appeal is answered in the negative. As to the Second Question posed we do not find it necessary to answer it as it is too general and not based on specific factual circumstances. The appeal is therefore dismissed with costs.